

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 1945 OF 2019

(Corrected order as per order passed on Civil Application No.1860/2022)

Surendra s/o Vinayakrao Deshmukh

Vs.

Rajendra Vinayakrao Deshmukh (Dead) through Lrs. (1a.) Dr. Shobha Rajendra
Deshmukh wd/o Rajendra Deshmukh and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A. M. Sudame, Advocate for petitioner.

CORAM : AVINASH G. GHAROTE, J.

DATE : 02/08/2022

1. Heard Mr. Sudame, learned counsel for the petitioner. None appears for the respondent though served.

2. As is indicated by the orders dated 13.6.2022 and 11.7.2022, the petition challenges the order dated 3.4.2018 passed by the learned Civil Judge Senior Division in R.M.J.C. No.60 of 2017, whereby the property has been directed to be put to auction instead of being divided (page 26). A review of this order has also been rejected by the order 30.1.2019 (page 29).

3. By the judgment and decree dated 28.6.2006 in Special Civil Suit No.222 of 1996, the property in question which is "A Two Storeyed house i.e. a building situated in Balaji Plots near Diparchan on Badnera road, Amravati, taluq and district Amravati,

situated within the Municipal Corporation Limits of Amravati City, on Nazul Plot No.1/34, Sheet No.66-C, admeasuring 4944 sq.feet.” was directed to be partitioned in which the plaintiff therein Smt. Jyoti Sanjay Deshmukh is declared to have 1/6th share and the defendant nos.1 to 7 and 8 also had 1/6th share and the defendant nos.3 to 6 therein being the legal heirs of Late Maya had 1/6th shares. The aforesaid described house is merely one of the suit properties. The preliminary decree for partition was put to (FDP) execution. In the meantime, it is submitted that by way of a relinquishment executed by the sisters and the legal heirs of Maya in favour of the petitioner Surendra he became the owner of 5/6th share in the aforesaid plot and the defendant no.1 therein namely, Dr. Rajendra Vinayak Deshmukh became the owner of 1/6th share. In the (FDP) execution, an application was filed for partition by metes and bounds and possession, in which the order dated 3.4.2018 came to be passed and though it is held that the DHR / Surendra had 5/6th share however on account of the Judgment debtor (JD) No. 1 Rajendra was running his hospital along with his wife in the suit property which is not denied by the decree-holder/petitioner and the Judgment debtor (JD) no.1 having incurred amount for the construction of the building, the property was directed to be auctioned instead of dividing it by metes and bounds. The review application is also rejected.

4. It is material to note that the preliminary decree dated 28.8.2006 directs the partition of the property by metes and bounds. The question of any auction of the property would only arise, when the Commissioner finds, that considering the respective shares to be carved out it is an impossibility to do so physically. In the instant matter, admittedly there is no such report by the Commissioner. The learned Court below also has not recorded the finding that the property in question, is incapable to be divided physically as per the shares of the parties. That being the position, in my considered opinion, unless there is such a finding recorded, the question of auctioning the property does not arise at all. It is equally trite that in a given case, where the value of a lesser share is determined and the person having the larger share is willing to purchase it that can also be the option which would be available, instead of putting the property to auction. That being the position, in my considered opinion, the impugned orders dated 3.4.2018 and 30.1.2019 cannot be sustained and are hereby quashed and set aside.

5. The petition is accordingly allowed. No costs.

JUDGE

Sarkate